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IN THE

Supreme Court of the United States.

October Term, 1906.

Office Supreme Court
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JAMES H. McKEN

No. 283.

THE UNITED STATES, Appellant,

v.

LEWIS E. BROWN,

No. 284.

LEWIS E. BROWN, Appellant,

v.

THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR LEWIS E. BROWN.

LORENZO A. BAILEY,
W. W. DUDLEY,
L. T. MICHENER,
Attorneys.

(20240 and 20241.)

TABLE OF CONTENTS.

PAGE.

Statement of Case, ... 1

Questions involved in the Appeal of the United States:

Argument: Points and Authorities:

I. Trial of Officer of Volunteer Forces, . . . 4

II. Second Jeopardy, ... 8

1. The Military Authorities, ... 9

2. The Civil Authorities, ... 12

3. Par. 957, Army Regulations, construed, . 14

4. The Fifth Amendment, ... 19

III. Failure to comply with Par. 957, . . . 22

IV. Sentence not approved by President, U. S., . 24

V. Impeachment of Court Martial Record, . . 25

VI. Sentence subject to collateral attack, . . 29

VII. Opinion of Court of Claims as part of Brief, . 31

Questions involved in the appeal of the Claimant:

Specification of Errors, ... 31

Argument: Points and Authorities, ... 32

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APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR LEWIS E. BROWN.

STATEMENT OF CASE.

On November 11, 1898, at San Luis, in the military department of Santiago, Cuba, before a general court martial composed of five officers, one of whom was an officer of the regular army serving temporarily under a volunteer commission, the claimant, Lewis E. Brown, a First Lieutenant in the volunteer forces of the United States, was tried on the charge of "Conduct unbecoming an officer and a gentleman, in violation of the sixty-first article of war;" the specification of the charge being that on October 11, 1898, at camp near San Luis, he "did gamble with enlisted men of Co. I, 9th U. S. V. Inft." (R., 7, 8).

By order of General Wood, commanding said department, the said court martial had been appointed "for the trial of such officers as may be properly brought before it." In said order all the officers detailed to compose the court were named and described as officers of the volunteer forces (R., 7). One of these officers, designated in the order as "Lt. Col. H. Y. Grubbs, 2d. U. S. V. I." and who presided at the trial was then an officer of the regular army, which fact was unknown to the accused (the claimant) until May, 1902, (R., 9).

The accused pleaded not guilty to the charge and to the specification. The court, after hearing the testimony of the witnesses for the prosecution and for the accused, respectively, and after a full trial on the merits, found and adjudged him not guilty of said charge and specification and fully and finally acquitted him. Thereupon the court adjourned *sine die* and sent the record of said trial to Gen. Wood (R., 8).

Twenty-five days later, on December 6, 1898, the same court reconvened and by command of Gen. Wood, but without notice to the accused and in his absence, the court reconsidered its former action and declared its former findings revoked and substituted therefor findings of guilty with sentence of dismissal from the service, and again adjourned *sine die* (R., 8).

Thereupon, Gen. Wood, being advised by the War Department that a "state of war still continues" and that therefore the action of the President was not required under the One hundred and sixth Article of War, approved the proceedings, findings and sentence and ordered the sentence to be executed, to take effect February 17, 1899 (R., 8, 9).

Ever since that date the claimant has been able, willing and ready to perform the duties of his rank as First Lieutenant of volunteers, and he has continued to insist that said sentence was illegal, null and void (R., 9).

He received and accepted his commission July 11, 1898,

his residence then being Houston, Texas (R., 7). His term of service was two years unless sooner discharged (30 S. L. 361, 1770, 1772). He rendered honest and faithful service within as well as beyond the limits of the United States.

All the other officers and the non-commissioned officers and enlisted men of his command, Co. I, 9th U. S. V. I., were mustered out on May 25th, 1899, and thereupon he duly applied for an honorable discharge as of that date, with pay and allowances, but his applications were refused by the War Department (R., 9).

He has received no pay or other allowances, excepting only his pay at the rate of $1,500 per annum, as allowed by law, for the period commencing July 2, 1898, and ending February 17, 1899 (R., 9).

In the Court of Claims, on December 17, 1902, he filed his petition (R, 1-3) against the United States, seeking to recover the following:

For pay, since February 17, 1899, .	$5,750.00
For 3 months' extra pay (30 S. L.,784),	375.00
For mileage and allowances for travel, estimated, ...	500.00
Total, ...	$6,625.00

In his petition he denies the jurisdiction of said court martial to try him and contends, upon the grounds therein distinctly stated, that the sentence of dismissal was illegal, null and void.

The Court of Claims, holding that the proceedings of the court martial "were void *ab initio*" and "that there was in fact no court present competent to try the claimant for his alleged offense" (R., 6), decided that he was entitled to pay to and including the date when the other officers and men of his company were mustered out (May 25, 1899), and also to two months extra pay, and entered judgment therefor in his favor against the United States in the sum of

$658.33 (R., 10) from which judgment each party sought and was allowed an appeal (R., 11).

The government by its appeal seeks to establish the validity of the sentence of the court martial. The questions thus involved and hereinafter discussed in the order here stated, are as follows:

I. Was the court martial competent, under the Seventy-seventh Article of War, for the trial of the claimant?

II. Was the action of the court martial, in revoking the acquittal and substituting therefor a conviction and sentence, lawful?

III. If the court martial was authorized under paragraph 957 of the Army Regulations of 1895 to make such substitution, was not the failure to comply with the requirements of said regulation fatal to the validity of the conviction and sentence?

IV. Was the sentence operative without the approval of the President of the United States?

V. Was the omission, from the record, of the entire testimony of one witness, tending to sustain the acquittal, sufficient to invalidate the sentence?

The questions involved in the claimant's appeal and the errors specified on his behalf are stated and discussed in the latter part of this brief.

QUESTIONS INVOLVED IN THE APPEAL OF THE UNITED STATES.

ARGUMENT: POINTS AND AUTHORITIES.

I. TRIAL OF OFFICER OF VOLUNTEER FORCES.

Under the 77th Article of War the court martial was wholly without jurisdiction to try the claimant and its sentence and all its proceedings in his case are utterly null and void.

Articles 77 and 78 (Sec. 1342 R. S. U. S.) read as follows:

"Article 77. Officers of the regular army shall not be competent to sit on courts martial, to try the officers or soldiers of other forces, except as provided in Article 78."

"Article 78. Officers of the Marine Corps, detached for service with the army by order of the President, may be associated with officers of the regular army on courts martial for the trial of an offender belonging to the regular army, or to forces of the Marine Corps so detached; and in such cases the orders of the senior officer of either corps, who may be present, and duly authorized, shall be obeyed."

General Wood, commanding the department of Santiago, by his order dated November 3, 1898, created a general court martial "for the trial of such officers as may be properly brought before it" (R., 7). He did not name the claimant or otherwise indicate what officers might be "properly" brought before the court.

He designated by name ten officers as members of the court and one more as judge-advocate. Of the ten members only five served (R., 8) and of these five the senior, Lieut. Col. Grubbs, who by virtue of his rank presided, was an officer of the regular army (R., 9). This officer had been a cadet at the U. S. Military Academy; was appointed thence, in 1896, Second Lieutenant in the regular army and as such granted indefinite leave of absence in 1898, to enable him to accept the volunteer commission held by him at the time of the trial; promoted, in September, 1898, to First Lieutenant in the regular army and as such, in January, 1899, after the trial, assigned to the Sixth Infantry of the regular army and mustered out of the volunteer service, in June, 1899 (R., 9).

The claimant, as an officer in the volunteer forces and who had never served in the regular army, was brought before this court for trial. He did not object to Colonel Grubbs as a member of the court, because he did not know then or until May, 1902, that Colonel Grubbs was an officer of the regular army (R., 9). He only knew Colonel

Grubbs as a volunteer officer. He had the right to assume that the 77th Article of War would not be violated or evaded by the designation of a regular army officer, by his temporary title in the volunteer forces, to sit on the trial of an officer of volunteers.

The failure of the claimant to object to Colonel Grubbs was not a waiver of the right to object nor was it an implied consent. Consent will not be implied as against one who is ignorant of the facts, and, furthermore, consent will not give validity to what is contrary to law.

In McClaughry *vs.* Deming, 186 U. S., 49, the accused expressly stated to the court martial that he had no objection to being tried by any member thereof, he well-knowing at that time that each member of the court was a regular army officer, and he thereafter pleaded guilty to the charges against him, whereupon the court passed sentence of dismissal from the service and confinement in the penitentiary, which sentence was confirmed by the President. Yet, when the accused thereafter complained, in *habeas corpus* proceedings, to the civil court that he, as an officer in the volunteer forces, could not lawfully be tried by said court martial because the members thereof were officers in the regular army and that the sentence, being in violation of the 77th Article of War, was void, his contention was sustained. The court said, in reference to the court martial: "This particular court was not legally constituted to perform the functions for which alone it was convened. It was therefore, in law, no court. The men were disqualified to act as members thereof and no challenge was necessary, for there was no court to hear and dispose of the challenge" (p. 65). * * * "His consent could no more give jurisdiction to the court, either over the subject-matter or over his person, than if it had been composed of a like number of civilians or of women" (p. 66).

The contention of the government that the president of the court martial was at the time serving under his com-

mission as an officer of volunteers and not under his commission as an officer in the regular army and that the latter commission was held in abeyance during the period of his service as a volunteer officer, and that therefore he was not disqualified to act as a member of the court to try the claimant, is wholly technical and without merit or reason to sustain it.

It is contrary to the intent of Congress which has specified, in Article 78, one and only one exception to the operation of the 77th Article, viz: That officers of the regular army, when associated on courts martial with officers of the Marine Corps, detached for service with the army by order of the President, shall be competent to act as members of such courts, so constituted, for the trial of offenders belonging to forces of the Marine Corps so detached.

The existence of this single exception and the language employed make it manifest that Congress did not intend that an officer of the Marine Corps should lose his identity as such when detached for service with the army by order of the President. Nor does a regular army officer lose his identity as such when serving under a volunteer commission; but, on the other hand, he retains all his rights, including, among others, the right of promotion, as shown in the case of Lieutenant-Colonel Grubbs. The Act of May 28, 1898, 30 S. L. 421, provides "That officers of the regular army receiving commissions in regiments of engineers, or any other commissions in the volunteer army, shall not be held to vacate their offices in the regular army by accepting the same."

The Article, 77, is prohibitive. The prohibition cannot be evaded by means of volunteer commissions carried by those who are thus in most positive terms declared to be incompetent to sit on a court for the trial of volunteers.

A conclusive argument for the application of Article 77 to the present case and against the Government's contention is found in the reason for the enactment of Article 77,

as stated in the decisions of the Circuit Court of Appeals, 113 Fed. Rep., 639, and of the Supreme Court, 186 U. S., 49, in McClaughry *v.* Deming, and those decisions are adopted *in toto* as part of this brief.

In the latter of those decisions the court said: "The mere fact of a direct enlistment of the volunteers into the service of the United States under the act of 1899 cannot, as we have said, change the essential character of the volunteer army as a different and separate force from that of the regular army." May it not be said with equal force and reason that the mere fact of the appointment in the volunteer service of a regular army officer, while he is on indefinite leave of absence, granted for the sole purpose of enabling him to accept such appointment, cannot change his essential characteristics or remove his disqualifications as an officer of a different and separate force from that of the volunteer army?

Within the true intent of Article 77, as shown by the reason for the enactment, the volunteer commission held by Lieutenant Grubbs of the regular army did not remove his incompetency to sit on the court which tried the claimant.

The 75th Article of War requires that a general court martial shall consist of not less than five officers. The utter disqualification of Colonel Grubbs to sit in the trial of the claimant left only four qualified members, which number was insufficient to form a court or to perform any duty or exercise any powers as a court. Therefore, in this case as in Deming's case, the question of waiver is eliminated as irrelevant "and no challenge was necessary, for there was no court to hear and dispose of the challenge" (186 U. S., 65).

II. Second Jeopardy.

Under the 5th amendment of the Constitution and also under the 102d Article of War and according to the universal opinion of military and civil authorities and the

dictates of reason, the court martial was wholly without jurisdiction to reconsider its findings of not guilty. The complete acquittal, and the sentence based upon such reconsideration are, therefore, illegal and utterly void.

1. The Military Authorities.

The first and most important question is as to the conclusiveness of the findings of not guilty. Upon this point the following authorities on courts martial law, and others on the same subject, have been carefully examined, viz:

Benét, Military Law and Courts Martial, 6th Ed., N. Y., 1868;
Winthrop, Military Law, 2d Ed;
Griffiths, Courts Martial, London, 1841;
Simmons, Courts Martial, London, 1863;
Macomb on Martial Law and Courts Martial, Charleston, S. C., 1809;
McArthur on Courts Martial, London, 1813;
Hough on Courts Martial, London, 1825;
O'Brien on Courts Martial, Philadelphia, 1846;
Harwood, Naval Courts Martial, N. Y., 1867;
Lee, Judge Advocate's Vade Mecum, Richmond, 1864;
Ives, Military Law, N. Y., 1859;
De Hart, Military Law, N. Y., Edinburgh, 1884;
Clode, Military and Martial Law, London, 1872.

There is nothing in any of these works to sustain the contention that a court martial may, on being reconvened, lawfully revoke or reconsider an acquittal, or that it may be reconvened for such purpose, excepting a foot note in Winthrop, at page 696, in these words:

"The court on the revision may so far change the finding as to substitute a conviction for an acquittal, adding thereupon a sentence;" citing Griffiths, 92.

There is nothing else in Winthrop's work to support the proposition or to justify the principle announced in the foot note. The reference to Griffiths does not sustain the foot note, for, upon examination, it appears that in the case referred to, the court was reassembled by virtue of a letter from His Grace the Duke of Wellington, "conveying the commands of His Majesty to revise its former sentence and the grounds on which these commands are given." The court thereupon revised its opinion and sentence and found the prisoner guilty of all the charges. While Griffiths' account is not very complete, it is quite certain that although the court had found the accused not guilty of the charges, it had found him guilty of some of the specifications and of some lesser offenses than those with which he had been specifically charged and had, thereupon, passed sentence upon him.

On the other hand, O'Brien forcibly denies the power in the following language:

"The sentence is not properly any part of the trial. The case has been tried and decided before the court had any right to pass a sentence, which is a consequent on the result of the trial if that trial has gone against the prisoner" (p. 277). "As a consequence of this right of confirming or not confirming the sentence, the custom of war authorizes the singular power in the authority ordering the court, to remit to the members the sentence with the proceedings leading thereto for reconsideration. This power can, it is thought, only be founded on the right of confirming or not confirming the sentence. If this be in truth its foundation, it would follow necessarily that, in case the court acquits the prisoner, the authority ordering the court cannot interfere in the matter. There is no law whatever giving him any shadow of right to disapprove of the finding of the court, except so far as said finding may incidentally apply to his disapproval of the sentence. But in the case supposed there is no sentence on which the approving authority can act, and his main action being thus negatived, all its concomitants fall to the ground. This doctrine seems

not only conformable to the spirit and letter of the article of war (65th), but also in strict consonance with every principle of natural and legal justice. After a prisoner has been solemnly acquitted by a majority of the members of a court martial on oath, it would seem strange and contrary to the spirit of our jurisprudence that he should be again subjected to conviction for precisely the same act and before precisely the same tribunal. It is without analogy in civil jurisprudence" (pp. 277, 278). "It" (the power of ordering revision) "was not intended to invest the approving authority with any right whatever to dictate to the consciences of the court" (p. 278). "It is admitted that cases have occurred where courts have been ordered to revise, not their sentence, but their finding, that finding being not guilty. It is also known that a few other instances of other most objectionable and even illegal proceedings may be found by raking up the records of courts martial. Even if the precedents were more numerous and more generally acquiesced in, it would not settle the question. But when it is remembered that these precedents are few and very generally condemned, the inference seems to be against the practice" (p. 278). "Writers on this subject seem to have overlooked or avoided this question" (p. 279).

The provision of Art. 65 mentioned by O'Brien is that which constitutes Art. 104, regulations of 1895.

Winthrop himself is clearly of the same opinion as O'Brien, notwithstanding the marginal reference on the same page (p. 696) to Griffiths', above mentioned, and at page 389 he says that in the sense of the 102d Article of War, an accused has been tried when he has been duly acquitted, and it is immaterial whether any or what action has been taken on the proceedings by the reviewing officer.

Clode says (p. 138) the functions of the court are terminated by the transmission of the proceedings to the confirming officer.

Cochran says (p. 106): "An acquittal does not require confirmation and cannot be revised." He also says (p. 102) the finding of not guilty will be announced in open court and the prisoner will be released. This is substantially the

same language as that of Winthrop, to the effect that an acquittal is immediately operative without any action whatever by the reviewing authority.

Lee says (p. 165): "An acquittal, even without the judgment of the court thereon, is a bar."

Benét (p. 112) indicates his views by citing 4 Blackstone Comm., 336, as follows; "There hath been, yet, no instance of granting a new trial, where the prisoner was acquitted on the first."

The 104th Article of War provides that, "No sentence of a court martial shall be carried into execution until the same shall have been approved by the officer ordering the court, or by the officer commanding for the time being." The War Department erroneously contends that the word "sentence" is applicable to a judgment of acquittal as well as to a judgment based on a conviction; but there is nothing to justify the contention. Throughout the Articles of War the word *sentence* is used repeatedly and always refers to, or implies, a conviction.

Sentence is the conclusion of law formally pronounced by a criminal court declaring the consequences to a defendant of the fact of guilt, confessed or ascertained by verdict.

21 A. and E. Enc. (1st Ed.) 1066, citing 109 Mass. 323; And. L. Dict; Black's Dict.

2. The Civil Authorities.

All the military authorities above-mentioned who refer to the subject agree that the revisory power of the officer ordering the court, including the power to remit proceedings to the court for reconsideration, is analogous to that possessed by judges of civil courts. Harwood (p. 144) says the procedure is "strictly consonant with the practice of the civil courts." See also Simmons (Sec. 719).

The rule in civil courts as to the conclusiveness of a verdict of not guilty and amendments of verdicts is as follows:

Even where by mistake of the jury, a verdict of acquittal is improperly rendered, it can never afterward, on the application of the prosecutor, in any form of proceeding, be set aside and a new trial granted.

1 Bishop Crim. Law, 7th Ed., Sec. 992.

After the jeopardy has attached, the prosecution can take no backward step in the proceedings. Id., Sec. 992.

Verdict of acquittal or conviction is a bar to a second trial though no judgment be upon the verdict.

1 Wharton Crim. Law, 7th Ed., Sec. 540;
3 Id., Sec. 3221;
2 Yerg., 24; 24 Am. Dec., 458;
Ball *v.* U. S., 163 U. S., 662;
Kepner *v.* U. S., 195 U. S., 100.

In the Kepner case, *supra*, the court said: "A person has been in jeopardy when he is regularly charged with a crime before a tribunal properly organized and competent to try him; certainly so after acquittal" (citing 97 U. S., 509). "The protection is not against the peril of second punishment, but against being again tried for the same offense."

The rule as to amending verdicts is as follows:

The court may amend a verdict in matters of form but not in matters of fact or substance, and where the alteration is merely to fulfill the evident intention of the jury. This applies to a general as well as a special verdict. When acquitted on the merits, the prisoner is immediately set at liberty and is forever free from that accusation.

1 Chitty Crim. Law, 3d Am. Ed., 645, 646, 647, 648.

"If the jury, through mistake, or evident partiality, deliver an improper verdict, the court may, before it is recorded, desire them to reconsider it and recommend an alteration." * * * "But it is considered as bearing too hard on the prisoner, and has been seldom done in modern times, when the decision was in his favor." Id., 647, 648.

This was the rule declared about one hundred years ago, and Perkins adds at p. 647 in a note, (A): "Where a jury returns an informal or insensible verdict, or one that is not responsive to the issue submitted, they may be directed by the court to reconsider it, but in no other case," citing State *v.* Arrington, 2 Murphey, 571. See also 1 Bishop Crim. Proc., Secs. 1004, 1013.

Where the jury returns a verdict which is not responsive to the charge, the judge may refuse to receive it and may direct the jury to retire and bring in a proper verdict, and may inform them as to why the verdict is incomplete or unresponsive, without necessarily suggesting what the verdict shall be.

State *v.* Keasbey, 50 La. Ann., 761; 23 So., 900.

These principles are embodied in Par. 957 of the Army Regulations hereinafter mentioned. See also Winthrop, 696.

3. PARAGRAPH 957, REGULATIONS OF 1895, CONSTRUED.

The foregoing makes it clear that the action of General Wood and of the court martial in attempting to set aside the findings of not guilty is not supported by the writers on military law and the law of courts martial. The authority for such action is not to be found outside of paragraph 957 of the Army Regulations, 1895, which provides as follows:

"When the record of a court exhibits error in preparation, or seemingly erroneous conclusions, the reviewing authority may reconvene the court for a reconsideration of its action, pointing out defects. Should the court concur in the views submitted, it will proceed by amendment to correct its errors, *and may modify or completely change its findings.* A reopening of the case, by calling or recalling witnesses is illegal."

If this was intended to confer the power upon a reviewing officer to remit a case to a court martial to reconsider a

complete and absolute acquittal, and to reconvene a court for such purpose, it is contrary to law and invalid. It is contrary to the Constitution, Fifth Amendment, which provides: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;" and in *ex parte* Lange, 85 U. S. (18 Wall.), 163, the court said: "It is not necessary to insist that other cases besides those involving life or limb are positively covered by the language of this amendment. * * * It is very clearly the spirit of the instrument to prevent a second punishment under judicial proceedings for the same crime, so far as the common law gave that protection."

If so intended, it is also contrary to the spirit if not the terms of the 102d Article of War, which provides that:

"No person shall be tried a second time for the same offense."

The exercise of such power would permit far greater injustice than second jeopardy before another jury, because, in the latter case, the accused may be heard again and face his accuser; but in the former case, he cannot be heard, but may be at the mercy of a court moved only by fear of an arbitrary and despotic superior officer.

So much of said paragraph 957 as provides that a court martial, on being reconvened, "may modify or completely change its findings," must be so construed as not to conflict with existing law and the spirit of the constitutional guarantee. Winthrop's construction of it is thus stated (p. 696): "In a case of acquittal it is no more than just that an error in form or substance should be caused to be corrected in order that the record may go on file so perfected that the accused will be fully sustained by it in the event of a subsequent plea of *autrefois acquit*."

In Ford *v.* State, 12 Md., 546, and also in Burk *v.* Comm., 5 J. J. Mar., 675, cited by the court in the mandamus proceedings instituted by the claimant (28 W. L. R. 787), the verdict was found to be manifestly improper, not

by review of the evidence, but upon the face of the verdict itself. Those cases come within the rule laid down by Chitty and Bishop (*supra*) distinguishing between matters of form and matters of fact or substance. And in each of those cases the court said that the verdict would have been *beyond alteration if it had been recorded.* In Ford's case (for murder) the Court of Appeals set aside the judgment because the verdict as recorded was not the verdict which the jury had returned. The verdict as returned was not in conformity with the statute, and the clerk, on the following day, in the absence of the defendant and after the jury had been discharged, undertook to make such conformity by an additional entry which was contrary to the facts. In Burk's case (which was only *quasi criminal*) the appellate court affirmed the action of the trial court in admitting further testimony of a witness who had been previously examined, after the jury had delivered an informal and irregular verdict but before such verdict had been recorded, and it never was recorded.

The Government contends that the regulation, par. 957, has the force of law and relies upon Swaim *v.* U. S., 165 U. S., 553, 565, and *Ex parte* Reed, 100 U. S., 13. The answer is, that in no case has that paragraph been construed to confer the power to reverse an *absolute and unqualified acquittal*, as was done in the case at bar. General Swaim was never acquitted. The court found him guilty of certain offenses but not of the specific charge, and pronounced a sentence, which, under the express terms of the 104th Article of War, was inoperative until approved. On reconsideration the court changed the sentence. The decision of the Supreme Court goes no further in this connection than as set forth in the syllabus, viz: "The action of the President in twice returning proceedings to a court martial, urging a more severe sentence, is justified by the Army Regulations of 1881." The question was merely as to the adequacy of punishment. The decision of the court

in that case can never be extended in reason to a case like that at bar, in which the question of guilt or innocence was settled at the outset by a complete and unqualified acquittal. This also applies to Reed's case, in which the accused was found guilty and sentenced and the admiral, raising the question of adequacy of punishment, sent the record back and a different and more severe sentence was imposed and executed.

Paragraph 957 does not purport to give, nor should it be construed as giving, authority to recommit a case to a court martial for reconsideration of findings of not guilty whereby the accused is wholly acquitted of every offense charged against him after a trial on the merits.

The power to recommit for reconsideration under said paragraph 957 should not be so construed as to permit a commanding officer to interfere with the judicial functions of the members of a court martial, and particularly in the determination of the question of innocence or guilt, after the court has decided all matters of fact and found and adjudged in favor of the accused.

The paragraph 957 is illegal, unconstitutional and void, in so far as, if at all, it purports, or was intended by the President, to confer upon a commanding officer the extraordinary and dangerous power to impose upon the members of a court martial his views as to the guilt or innocence of the accused, either before or after a trial upon the merits, and especially after such trial and a complete acquittal, and to interfere by an order or even a bare suggestion with the free exercise of their consciences by his subordinate officers composing the court, touching the question of the guilt or innocence of the accused, in the discharge of their judicial functions under the obligation of an oath—he being under no such obligation and not a member of the court.

But the attempt of the Government to assert that Par. 957 has the force of law and to give it an interpretation and application contrary to the Fifth Amendment and to the

102d Article of War enacted by Congress, is met by the declaration of the Supreme Court that a regulation prescribed by one of the Executive Departments, even though approved by the President, is void if in conflict with an act of Congress. In U. S. *v.* Symonds, 120 U. S., 50, the court said:

"The authority of the Secretary to issue orders, regulations and instructions, with the approval of the President, in reference to matters connected with the naval establishment, is subject to the condition necessarily implied, that they must be consistent with the statutes which have been enacted by Congress in reference to the Navy. He may, with the approval of the President, establish regulations in execution of, or supplementary to, but not in conflict with, the statutes defining his powers or conferring rights upon others. The contrary has never been held by this court. What we now say is entirely consistent with Gratiot *v.* U. S., 45 U. S. (4 How.), 80, and *Ex parte* Reed, 100 U. S., 13, upon which the Government relies. Referring in the first case to certain army regulations and in the other to certain navy regulations which had been approved by Congress, the court observed that they had the force of law. See also Smith *v.* Whitney, 116 U. S., 181. In neither case, however, was it held that such regulations, when in conflict with the Acts of Congress, could be upheld."

"The court will not permit the practice of an Executive Department to defeat the obvious purpose of a statute."

Webster *v.* Luther, 163 U. S., 331, 342.

"It is only in cases of doubt that the construction given to an Act by the department charged with the duty of enforcing it becomes material."

U. S. *v.* Tanner, 147 U. S., 661, 663.

Notwithstanding Par. 957, the court had no power, either with or without General Wood's order, to alter its findings of not guilty, after the same were recorded and particularly after the record had passed from the control of the court

and the members of the court had separated. The contention that the subsequent proceedings were part of the original trial is an attempt to evade the spirit and intent of the 102d Article of War. The original trial ended finally with the acquittal.

4. The 5th Amendment.

The War Department strenuously contends that the Fifth Amendment of the Constitution has been held not to apply to court martial trials. In the mandamus proceedings whereby the claimant unsuccessfully sought to be mustered out with the other officers of his command (U. S. *ex rel.* Brown *v.* Root, 18 App. D. C., 239, affirming 28 W. L. R. 787) the only cases cited in support of that contention for the respondent were as follows:

Ex parte Milligan, 4 Wallace, 2;
In re Bogart, 2 Sawyer, 396; 3 Fed. Cases, 796;
Dynes *v.* Hoover, 20 How., 65;
In re Esmond, 5 Mackey, 64;
Callan *v.* Wilson, 127 U. S., 540.

These cases wholly fail to support the proposition. Bogart's, Dynes' and Esmond's were the only cases among them which involved the powers or procedure of courts martial, and Esmond's case was the only one of them which involved the question of second jeopardy under the Fifth Amendment. Milligan's case involved the validity of the sentence of a military commission and Callan's case involved the validity of the sentence of the police court of the District of Columbia.

In Callan's case the Supreme Court held that he was entitled, on *habeas corpus*, to his discharge from custody, because it appeared that he had been adjudged guilty of an infamous crime, to wit, conspiracy, without ever having been tried by a jury, and in violation of his constitutional rights.

In Milligan's case the Supreme Court said that the controlling question was whether the military commission had jurisdiction legally to try and sentence him, and the court decided this in the negative.

Bogart's case was on *habeas corpus* to obtain his discharge from custody, he being held for trial by a naval court martial. He had not been tried.

Dynes' case was an action for false imprisonment, in which the defendant justified by showing that the imprisonment was in execution of the sentence of a naval court martial. Upon the charge of desertion the court martial had found him guilty of the specification, and "of the charge not guilty of deserting, but guilty of attempting to desert." Upon these findings the sentence of imprisonment was based. His main contention in the civil court was that "the finding was *coram non judice*, it being for an offense of which the plaintiff was never charged and of which the court had no cognizance," but the court, in accordance with the authorities, overruled this contention.

In Esmond's case the question was whether his trial and acquittal in the Supreme Court of the District of Columbia, on a charge of larceny, was a bar to his subsequent trial and conviction by court martial under the 62d Article of War, he being at the time in the military service, and on this point the court held "that a trial by civil court of an act which has military as well as civil relations, is not a bar to a subsequent trial by court martial."

In these five cases Esmond's is the only case in which the question of second jeopardy under the Fifth Amendment arose. The court sustained the proceedings of the court martial upon the ground "that larceny committed *against the peace and Government of the United States*, and larceny committed *to the prejudice of good order and military discipline*, were not in a legal sense, and therefore were not within the meaning of the prohibitory clause of the Fifth Amendment, *the same offense*," thus conceding the application of the second jeopardy clause to court martial cases.

The only other reference to the Fifth Amendment in these cases is in connection with the first clause thereof. In Milligan's case Chief Justice Chase, for himself and three other justices, referring to the power of Congress to make rules for the government of the army and navy, said it was a power to provide for trial and punishment by military courts without a jury, and added, "nor, in our judgment, does the fifth, or any other Amendment, abridge that power. 'Cases arising in the land or naval forces, or in the militia in actual service in time of war or public danger,' are expressly excepted from the Fifth Amendment 'that no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury,' and it is admitted that the exception applies to other Amendments as well as to the Fifth." In Bogart's case and elsewhere this language has erroneously been quoted as the language of the Supreme Court. The opinion of the court in Milligan's case was delivered by Mr. Justice Davis, but the language quoted does not even remotely bear upon the question of second jeopardy; it must be limited in its application to the subject-matter of inquiry in that case, to wit, the power of Congress to make rules for the government of the Army and Navy. The Chief Justice, evidently referring to the whole court, said: "We agree in the proposition that no department of the Government of the United States—neither President, nor Congress, nor the courts— possess any power not given by the Constitution."

The inevitable result of the contention made by the War Department, if sustained, would be to deny to all persons in the land and naval forces the benefit, not only of the prohibition against second jeopardy for the same offense, but also of the provision that no person shall be compelled to testify against himself in a criminal case nor be deprived of life, liberty, or property without due process of law. The language used by Chief Justice Chase in Milligan's case was

never intended by him, nor has it ever been understood by lawyers generally, to bear such interpretation as that now given to it by the War Department.

The efforts of the Department to establish a system of procedure which shall not be subject to constitutional limitations have met with no judicial encouragement. These efforts can be found in a long line of cases. One of the latest of these is Carter *v.* McClaughry, 183 U. S., 365, 388, in which the Government strenuously contended that the 5th Amendment is not applicable in proceedings by court martial and that the question of second jeopardy in such proceedings can only be raised under the 102d Article of War. The court held that the Amendment, if applicable, was not violated in that case, but did not decide the question of its applicability (p. 390).

III. Failure to comply with Par. 957, Army Regulations.

It appears (R., 10) that on December 1, the acting judge-advocate, at headquarters, had the record of the case before him and disagreed with the court martial on the effect of the evidence and considered the same "conclusive as to the guilt of the accused." He recommended reconsideration by the court of its finding.

On the same day General Wood caused the record to be returned to the court for reconsideration with an endorsement thereon (R., 8) to that effect, but without "pointing out defects" as required by paragraph 957, nor does it appear that he found that the record exhibited "error in preparation or seemingly erroneous conclusions." He did not adopt the acting judge-advocate's recommendation and views nor did he even refer thereto, and it does not appear that they were ever made known to the court (R., 10). The court on December 6, therefore, acted merely upon General Wood's order for reconsideration, which action on his part and on the part of the court was not authorized by the Regulations.

Furthermore the power of review vested in General Wood could not be delegated.

U. S. *v.* Page, 137 U. S., 673, 678, 680;
Runkle *v.* U. S., 122 U. S., 543;
11 Op. Att'y Gen., 21.

In reviewing the proceedings he was required to act personally. He cannot delegate his authority, and if he assume to do so the acts of his delegate will be of no legal virtue.

Winthrop, p. 687.

Unless it appear otherwise than argumentatively that the findings of not guilty, and the acquittal were laid before General Wood and were by him personally considered and disapproved, they must be regarded as the last lawful action by the court in reference thereto, under said par. 957.

Runkle *v.* U. S., 122 U. S., 548.

Winthrop regards the Runkle case above cited to be overruled by United States *v.* Fletcher, 148 U. S., 84, and United States *v.* Page, 137 U. S., 673, but in this he is greatly mistaken. In each of those cases it was apparent on the face of the record that the proceedings had been laid before the President and that he had personally considered and approved the same. In the Page case the Supreme Court said: "The only possible conclusion from such statement (referring to the record) is that the approval was by the President, in whom alone was reposed the authority to act." And in commenting on the Runkle case the court added: "The record failed to show the vital fact of the submission of the proceedings to the President."

These cases of Fletcher and Page follow and confirm the principle, laid down in Runkle's case, that it must affirmatively appear, not argumentatively, but by express statement of fact, that the proceedings had been by the reviewing authority personally considered and acted on by him, and as stated in the Page case, this is a "vital fact."

The decision in the Runkle case has never been disturbed

and it is reasserted fully and without reserve in McClaughry *v.* Deming, *supra.*

The record in this case does not show, affirmatively, that General Wood ever personally considered or acted upon the case until December 24, 1898, and he then approved the findings and sentence without ever disapproving anything in the record.

The first endorsement is merely the opinion of the Judge Advocate of General Wood's department, which does not appear to have been considered by the court martial, and is not properly a part of the record. The second endorsement is in effect merely a command to the court to reconsider without stating what should be reconsidered. It is evident that General Wood attempted to delegate his discretionary power, whether judicial or otherwise, to his judge advocate and adjutant general, or that the latter wrongfully assumed such power, and that the court reconvened and revoked its former findings and passed sentence before General Wood ever saw the record or considered the matters involved. This action of the court was therefore unauthorized and illegal and void.

The penalty for the violation of the 61st Article of War is fixed by law, and the act of the court in passing sentence after a pretense of finding the accused guilty of the charge, was merely ministerial, involving no discretionary powers.

IV. Sentence not approved by the President.

The sentence of the court martial has never been confirmed by the President, as required by the Articles of War.

"Art. 106. In time of peace no sentence of a court martial directing the dismissal of an officer shall be carried into execution until it shall have been confirmed by the President."

War with Spain commenced April 21, 1898. Hostilities were suspended August 12, 1898. Treaty of peace signed December 10, 1898, ratified February 6, 1899, by the Presi-

dent, as advised by the Senate, and ratification proclaimed by the President April 11, 1899.

30 S. L., 364, 1742, 1780, 1754.

The date of the alleged offense was October 11, 1898 (R., 8), which was after hostilities were suspended.

The sentence was not approved by General Wood until December 24, 1898 (R., 8), which was after the treaty of peace had been signed and his order of February 15, 1899, for execution of the sentence, was after the treaty was ratified by the President.

The President of the United States, by and with the advice and consent of the Senate, had duly appointed the claimant to his office of First Lieutenant. It is not to be presumed that Congress intended by the 106th Article of War to permit such an appointment to be vacated without the approval of the President, and even without his knowledge, except during the continuance of hostilities. Article 106 was intended to enable a commanding officer to meet emergencies in the field during actual, not merely technical war. The term "time of peace," as employed in Article 106, is fairly and in reason applicable in this case to the whole period subsequent to the suspension of hostilities on August 12, 1898 (30 S. L., 1780); certainly after February 6, 1899, when the treaty was ratified by the President.

The question is not one which merely involves individual rights; it involves also the prerogatives of the President of the United States, Commander-in-Chief of the Army and Navy, and the right of the Government to the services of an officer.

V. Impeachment of the Court Martial Record.

In the Court of Claims the claimant established his contention that a material and essential portion of the proceedings had been omitted from the court martial record. Although this does not appear in the formal findings of fact,

it is thus stated in the opinion of the court (R., 4, par. 4); "It also appears that the record of the court martial upon which the case was considered by the commanding general was attacked collaterally, it being shown *aliunde* the record that the testimony of a witness, who was summoned, sworn, and examined before the court as a witness for the accused, and whose testimony tended to prove the accused innocent of the charge and specification, was wholly omitted from the record."

The Army Regulation, Par. 954, requires every court martial to keep a complete and accurate record of its proceedings, to be authenticated by the signatures of the president and judge-advocate. This regulation is not contrary to any statute and has the force of law.

Such a record was not made in the case of the claimant. The only paper purporting to be the record of his trial is a record of a part, only, of the proceedings in his case. It wholly omits the testimony of Sergeant Hall and by reason of this omission the judge-advocate at headquarters (R., 10) was misled. Upon the false record laid before him he considered the acquittal to be against the weight of the evidence and for that reason, only, he recommended that the finding of not guilty be reconsidered. Had Sergeant Hall's testimony been recorded, the judge-advocate would have found four witnesses for the prosecution and four for the defense.

The omission, whether intentional suppression of evidence or mere inadvertence, was a fraud upon the Government and upon the accused.

The paper certified as the record and sent to General Wood was not the record required by the regulations (pars. 954, 955). It was a false, fictitious and fraudulent document.

It was upon this false and fraudulent document, purporting to be a record of his trial, that all the proceedings after the acquittal were based, viz: The recommendation for the

court to reconsider, the order of General Wood for reconsideration, the reconsideration itself, and the conviction and sentence, and the order of General Wood directing the sentence to be carried into execution. These proceedings are voidable as procured by fraud either actual or constructive.

The proceedings of any court may be impeached for fraud or for want of jurisdiction.

"Although it is not permitted to show that the court was mistaken, it may be shown that they were misled. Fraud is an extrinsic, collateral act which vitiates the most solemn proceedings of courts of justice." In such case the whole proceeding is *fabula non judicium.* This principle applies to every species of judgments—even to judgments of the House of Lords.

2 Best Evid., Sec. 595, citing Duchess of Kingston's case, 11 St. Tr., 262.

The doctrine imputing absolute verity to a judicial record is subject to various exceptions. In Starbuck *v.* Murray, 5 Wend., 156, the court said: "For what purpose does the defendant question the jurisdiction of the court? Solely to show that its proceedings and judgment are void, and therefore, the supposed record is no record."

"A departure from established modes of procedure will often render the judgment void; thus, the sentence of a person charged with felony, upon conviction by the court, without the intervention of a jury, would be invalid for any purpose."

Windsor *v.* McVeigh, 93 U. S., 274.

The deviation by a court martial from the statute or from the regulations prescribing the manner of its procedure may render the case *coram non judice.* In such case the proceedings are not merely voidable but void.

Dynes *v.* Hoover, 61 U. S., 65.

The sentence in such a case, as stated by Mr. Attorney-General Cushing, "gives no right, it bars no right, it binds nobody and all concerned in executing such a sentence are trespassers."

6 Op., 506, June 5, 1854;
Wise *v.* Withers, 3 Cr., 331;
Winthrop, 1173.

The Secretary of War may cancel an honorable discharge which was obtained from the department by falsehood and perjury.

16 Op. Att'y Gen., 349, May 27, 1879.

That being so, he surely may cancel a dishonorable discharge which was obtained by the same or like means.

The department takes the position that after the reviewing authority has acted in a case it is too late to urge that the sentence is invalid on account of weight of evidence, etc. If that were the question now the answer would be that the claimant had no opportunity to know what was in the record until *after* the reviewing authority had acted.

The question now is this: Where there is fraud, actual or constructive, in making up a record, so that by the omission of certain evidence therefrom it is made to appear that the findings are contrary to the weight of evidence, and thus bringing about a reconsideration of such findings to the prejudice of the accused, whether or not such fraud can be inquired into and its evil consequences remedied?

The omission was, at the very least, a gross irregularity and sufficient as such, under the authorities hereinbefore cited, to avoid the sentence, and in view of the serious nature and consequences of the irregularity itself it is a monstrous thing to say that there is no redress for the injured party.

The Government's contention that the record imports

absolute verity and is conclusive upon all parties should not be sustained without a careful inquiry as to what it would lead to. "The 'bearings' of the proposition 'lie in the application of it.'"

If the contention be correct, it would not be competent for the claimant to show by matter *dehors* the record that the members of the court martial were officers of the regular army, or that they were civilians, and that the court was created and organized in most flagrant violation of law.

The court martial was dissolved long ago, even before the claimant knew it had reconsidered the acquittal. He was not informed of it until the order of February 15, 1899, was issued.

He was brought into court and faced his accusers and prevailed. By the omission of testimony favorable to him the false record brought about an order for reconsideration. That reconsideration was nothing more nor less than a surrender by the members of the court of their own official responsibilities and the adoption by them of the views of the commanding officer, who knew nothing of the merits of the case except what he may have learned from the incomplete and false record. If it was not that, then it was a second trial, contrary to the constitution and to the 102d Article of War and without the presence or knowledge of the accused.

Under the circumstances the court was without jurisdiction to convict him and pronounce sentence.

VI. Sentence Subject to Collateral Attack; No Presumptions in its Favor.

It must appear, either by the record or by presumption of law, that the court had not only jurisdiction of the parties and the subject-matter, but also jurisdiction to render

that particular judgment; otherwise the judgment is void and may be questioned collaterally.

U. S. *v.* Walker, 109 U. S., 258;
Ex parte Nielson, 131 U. S., 176;
12 A. & E. Enc., 147, note 3, *Id.*, 246 to 249;
Elliot *v.* Piersol, 1 Pet., 328, 340;
Thompson *v.* Whitman, 85 U. S., 457.

There is no such presumption in favor of the judgment of a court martial. As stated by Mr. Chief Justice Waite:

"A court martial organized under the laws of the United States is a court of special and limited jurisdiction. It is called into existence for a special purpose and to perform a particular duty. When the object of its creation has been accomplished, it is dissolved. 3 Greenl. Ev., Sec. 470; 11 Pick., 442; 19 Johns., 7, 30; 3 Serg. & R., 590, 599. Such also is the effect of the decision of this court in Wise *v.* Withers, 7 U. S., 3 Cranch, 331, which, according to the interpretation given it by Chief Justice Marshall in *Ex parte* Watkins, 28 U. S., 3 Pet., 193, 207, ranked a court martial as one of those inferior courts of limited jurisdiction whose judgments may be questioned collaterally. To give effect to its sentences it must appear affirmatively and unequivocally that the court was legally constituted; that it had jurisdiction; that all the statutory regulations governing its proceedings had been complied with and that its sentence was conformable to law. 61 U. S., 20 How., 65, 80; 19 Johns, 33. There are no presumptions in its favor so far as these matters are concerned."

Runkle *v.* U. S., 122 U. S., 543.

A judgment invalid for want of jurisdiction is absolutely void, and the person against whom it is rendered is under no obligation to take any direct steps for its cancellation.

Tenny *v.* Taylor, 1 App. D. C., 223, 227, citing 8 How., 495; 11 How., 437; 18 Wall, 457; 93 U. S., 274; 109 U. S., 258.

The power in the court to pronounce, and in General Wood to execute, the sentence, not appearing on the face of the record, but the contrary being manifest, the sentence is void. It is not binding upon the accused, the Secretary of War, or any other person. "An officer is not justified in obeying the order of a judge or court having no jurisdiction in the matter."

Duncan *v.* Darst, 1 How., 301, 308;
Elliott *v.* Piersol, 1 Peters, 328, 340;
Wise *v.* Withers, 3 Cr., 331;
Winthrop, 1173;
Dynes *v.* Hoover, 61 U. S., 65;
6 Op. Att'y Gen., 506;
3 Op. Att'y Gen., 396.

VII. The claimant adopts as part of this brief the entire opinion of the Court of Claims, excepting only the last paragraph thereof (R., 6).

The learned Chief Justice, in his statement that "This case comes into court with a record which is not creditable to the administration of military justice" (R., 4), uttered a well-deserved criticism from the standpoint of a good soldier as well as an eminent jurist.

QUESTIONS INVOLVED IN THE APPEAL OF THE CLAIMANT.

Specification of Errors.

The Claimant is advised that the Court of Claims erred as follows:

1. In holding that the muster out of the regiment "was the dissolution of the regiment and of every office in and connected with it" (R., 6) and in denying to the claimant his pay as First Lieutenant at $1,500 per annum from and after May 25, 1899, to and including July 11, 1900.

2. In denying to the claimant one month's extra pay for

service within the limits of the United States, in addition to the two months' extra pay allowed by the court.

3. In failing to determine the place where the claimant's constructive discharge was effected and in denying to him allowances for travel therefrom or else from San Luis, Cuba, to Houston, Texas.

Argument: Points and Authorities.

I.

The Finding VII (R., 9) as to the muster out of the claimant's company is a conclusion of law rather than a finding of fact. If the claimant has ever been mustered out it was constructively, by operation of law, only, and the time and place thereof are to be determined as matter of law and not of fact.

The terms of the statute, January 12, 1899, 30 S. L. 784, providing that the discharge of volunteer officers shall, "as far as practicable, take effect on the date of the muster out of the organization to which they belong," permit the President to discharge a volunteer officer before or after the muster out of his regiment. The words, "as far as practicable," confer upon the President the power to retain a volunteer officer in service after the muster out of his regiment. The muster out of the regiment, therefore, did not *ipso facto* dissolve or terminate the claimant's office.

By the terms of that statute the power to determine when it was "practicable" to muster out the claimant was vested in the President. The court had the power to determine, as it has done, that the claimant was not discharged or dismissed by virtue of the court martial proceedings, but it was without jurisdiction to order his discharge or to decide when it was "practicable" for him to be discharged.

The President, possessing exclusively the power to discharge the claimant and to determine when it was practi-

cable for such discharge to take effect, has, through the War Department, not only failed but refused to exercise that power.

The refusal to discharge the claimant as of the date of the muster out of the regiment was based upon the ground, as alleged by the Department, that he was already out of the service by reason of the sentence of the court martial. The government has thus elected, irrevocably, to stand by the court martial proceedings and should not now be heard to say that the claimant was in any way affected by the muster out of the regiment.

"Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law."

Ohio, etc., Ry. Co. *v.* McCarthy, 96 U. S., 258.
7 A. & E. Enc. (1st Ed.) 22, 23, notes.

The sentence of the court martial was a nullity. Consequently the sentence and the order purporting to carry it into execution in no way affected the claimant's status as First Lieutenant of Volunteers, nor has his status been affected by any subsequent act of the President or of the War Department.

The question then presented is whether or not the claimant has been constructively or by operation of law, discharged or mustered out from the service; and if so, how and by what means, when and where?

The record does not furnish an answer to this question but the court may take notice of the following:

By Joint Resolution, April 20, 1898, Congress made demand on Spain to withdraw from Cuba and directed and empowered the President to call into service and to use the volunteer force "to such extent as may be necessary" to carry the resolution into effect (30 S. L., 738, 739).

The Act of April 22, 1898, to provide for temporarily increasing the military establishment in time of war, etc., (30 S. L., 361, Chap. 187) provides that the volunteer army shall be maintained only during the existence of war or while war is imminent and that all enlistments "shall be for a term of two years unless sooner terminated, and that all officers and men composing said army shall be discharged from the service of the United States when the purposes for which they were called into service shall have been accomplished, or on the conclusion of hostilities" (Sec. 4).

That Statute was followed immediately by the President's proclamation of April 23, 1898, calling for volunteers and later by his proclamation of May 25, 1898, calling for additional volunteers. Each of these proclamations stated that such volunteers were "to serve for two years unless sooner discharged" (30 S. L., 1770, 1772).

In response to these calls the claimant joined his company at Houston, Texas, June 25, 1898. He received and accepted his commission at New Orleans, July 11, 1898 (R., 7).

The Act of January 12, 1899 (30 S. L., 784, chap. 46), extended by the Act of May 26, 1900 (31 S. L., 217, chap. 586) provides that the muster out of volunteer officers "shall, as far as practicable, take effect on the date of the muster out of the organization to which they belong."

The Act of March 2, 1899, (30 S. L., 977, chap. 352), provided for the continuance of the volunteer force in service until July 1, 1901 (Secs. 12, 15).

The Act of March 3, 1899 (30 S. L., 1064, chap. 423), appropriated money to pay officers of volunteers until June 30, 1900, and contains these words: "Provided, That the provisions of this Act shall apply for the payment of Volunteers as fully as though they formed part of the Regular Army" (p. 1074).

April 11, 1899, the President proclaimed the ratification of the treaty of peace with Spain (30 S. L., 1754) and on

May 25, 1899, all the officers and men of claimant's regiment excepting only himself, were mustered out of the service of the United States. The War Department not only omitted, but expressly refused upon his application, to muster him out or discharge him as of that date (R., 9).

The Act of February 2, 1901 (31 S. L., 748, chap. 192), provided for the reorganization of the army from and after that date.

The right of a volunteer officer, when honorably discharged, to a certificate of such discharge, is recognized by statute. R. S. U. S., Sec. 282; Act of July 1, 1902, chap. 1353, 32 S. L., 629.

II.

Upon the above showing and upon the whole record it appears as follows:

1. That the claimant's office was not a permanent one but was created by law for a special purpose which has been accomplished.

2. That the treaty of peace or its promulgation did not terminate said office; because after the treaty was signed and ratified (Feby. 6, 1899) Congress provided for the continuance of the volunteers in service until July 1, 1901 (Act of Mch. 2, 1899), and made appropriation for the entire volunteer force until June 30, 1901, and it was not until Feby. 2, 1901, that Congress, by the reorganization statute, eliminated the volunteer force.

3. That by the terms of the Act of Jany. 12, 1899, it was left to the President to determine, in his own discretion, when it would be "practicable" to muster out the claimant (who was then in actual service) without reference to the date of the muster out of his regiment. The President has never acted in that respect but, through the War Department, evidenced his determination that it was not "practicable" to muster out the claimant on May 25, 1899, when

his regiment was mustered out. Claimant's request for muster out as of that date was refused by the Department.

4. As the court is without jurisdiction to determine the question as to when it was "practicable" to muster out the claimant and as it has never been determined by the President, otherwise than by his proclamations, it seems very clear that the Act of April 22, 1898, and the terms of the proclamations stating that the volunteers were "to serve for two years unless sooner discharged" answer the question as to *how* and *when* the claimant's office terminated by operation of law.

5. Claimant received and accepted his commission July 11, 1898. His term of service fixed by law and by proclamation was two years ending July 11, 1900, unless sooner discharged and he never was discharged in fact. He is therefore entitled to be mustered out and to an honorable discharge as of July 11, 1900.

6. As he has been, after "honest and faithful" service informally, by operation of law, mustered out and discharged he is entitled, under the Act of January 12, 1899, (30 S. L., 784) to two months' extra pay for service "beyond the limits of the United States" and also to one month's extra pay for service "within the limits of the United States." The terms of that Act are "That in lieu of granting leave of absence and furloughs to officers and enlisted men belonging to companies and regiments of United States Volunteers prior to muster out of the service, all officers and enlisted men belonging to volunteer organizations hereafter mustered out of the service who have served honestly and faithfully beyond the limits of the United States shall be paid two months' extra pay on muster out and discharge from the service, and all officers and enlisted men belonging to organizations hereafter mustered out of the service who have served honestly and faithfully within the limits of the United States shall be paid

one month's extra pay on muster out and discharge from the service, from any money in the Treasury not otherwise appropriated." The claimant was not granted leave or furlough.

7. The place where claimant was so discharged from the service must be determined in order to ascertain the amount due him for travel allowances. The Act of May 26, 1900, "Making appropriation for the support of the Regular and Volunteer Army for the fiscal year ending June thirtieth, Nineteen hundred and one" provides, "That hereafter when an officer shall be discharged from the service, except by way of punishment for an offense, he shall receive for travel allowances from the place of his discharge to the place of his residence at the time of his appointment or to the place of his original muster into the service, four cents per mile," excepting sea travel, for which actual expenses only are allowed (31 S. L., 210).

He was at Songo, near Santiago de Cuba when he received the order declaring him dismissed from the service (Rec., 9). That order being illegal and void, and inoperative to affect his legal status or rank as an officer, was so far executed as to leave him at Songo without duty, and a few days later he was furnished at headquarters with a pass on a transport which brought him from Santiago to New York City, which should be regarded as the place where he was constructively discharged at the expiration of his two years' term of service, July 11, 1900.

The distance from New York City to Houston, Texas, where he resided at the time of his appointment, is 1,733 miles, according to the records of the Paymaster-General's Office.

III.

The claimant is therefore entitled to recover the following, viz:

Pay as first lieutenant, not mounted, at $1,500 per annum, for 1 year, 4 months and 24 days, commencing February 18, 1899, and ending July 11, 1900, ...	$2,100.00
Extra pay, 3 months, ...	375.00
Travel allowances New York to Houston, 1,733 miles, at 4 cents per mile, ...	69.32
Total, ...	$2,544.32

Respectfully submitted,

LORENZO A. BAILEY,
W. W. DUDLEY,
L. T. MICHENER,
Attorneys for Claimant.